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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-335

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,

Petitioner,

vs.,

ROBERT LaFONTAINE,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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STATEMENT OF GROUNDS FOR FILING SUPPLEMENTAL BRIEF

On August 11, 1978, the Court of Appeals for the Seventh Circuit, rendered its opinion in *O'Neill* v *Public Law Board No. 550*. This opinion, bearing docket number 77-1339, has not been officially reported, but the text of it has been published in the advance sheets to CCH *Labor Law Reports*, dated September 8, 1978,

and may be found at 84 CCH *Labor Cases* Paragraph 10772. For the reasons which appear below, petitioner respectfully calls this Court's attention to this decision pursuant to Rule 24(5) as a new case not available at the time of petitioner's August 28, 1978 filing of its petition for a writ of certiorari. The *O'Neill* opinion, as so published, is included at the end of this supplemental brief.

ARGUMENT

In Section C of the Argument portion of our Petition, we relied on another Seventh Circuit opinion — *Kotakis* v *Elgin, J & E R*, 520 F2d 570, cert den 423 US 1016 (1975) — to support the proposition that where a discharged railroad employee has authorized his union to submit his claim for reinstatement to an adjustment board and knows that his case is pending there, then notice by the board of the proceedings to the union satisfies the notice requirement of Section 153 First (j) of the Railway Labor Act, 45 USC § 151 et seq., even though the employee receives no notice from the Board. Moreover, we urged that *Kotakis* appeared to conflict with the result reached below by the Court of Appeals for the Sixth Circuit which we read as extending the Sixth Circuit's holding in *Cole* v *Erie Lackawanna Ry Co*, 541 F2d 528 (1976), cert den 433 US 914 (1977), to all public law board cases so that, *Kotakis* notwithstanding, all railroad employees are required by Section 153 First (j) to be given notice by the Public Law Board before which there cases are being handled by their unions. If there could have been any doubt of the existence of a conflict between the Sixth and Seventh Circuits before, *O'Neill* v *Public Law Board No. 500, supra*, effectively removes it.

In *O'Neill*, a railroad employee was discharged for drinking on the job. The United Transportation Union — the same labor organization involved in *Kotakis*, *Cole* and *LaFontaine* — caused the employee's claim to be placed before a Public Law Board pursuant to 45 USC § 153, Second, the same kind of Board involved in *Cole* and in this case, but not in *Kotakis* (where the claim was submitted to the National Railroad Adjustment Board under 45 USC § 153 First). The Board ruled against the employee who commenced an action to review the unfavorable award.

In urging that the award be set aside, the employee claimed that the public law board was required to give him notice and had failed to do so. The Seventh Circuit, in contrast with the Sixth Circuit's ruling below and in *Cole*, ruled that the notice given the union by the Board satisfied the notice provision of Section 153, First (j) and any requirements of due process of law because, by virtue of the union constitution — the same constitution applicable here and in *Cole* — the employee had authorized his union to represent him before the Board and to receive notice of hearing on his behalf.

As to *Cole*, the Seventh Circuit had this to say:

> "[W]e hold in contrast to the Sixth Circuit that where an individual employee authorizes his union to represent him before such boards and to receive any notices on his behalf, Section 153 First (j) does not require that actual notice be given to the individual employee.[5]
>
> "[5] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the

> *conflict* between the holding of this case and the holding of the Sixth Circuit in *Cole* v *Erie Lackawanna Ry Co, supra.*" App at p A6 (emphasis supplied).

Additionally, the Seventh Circuit took issue with the Sixth Circuit's reading of *Kotakis* (541 F2d at 534):

> "[4] Although the Sixth Circuit stated that it agreed with a line of Seventh Circuit decisions, we think those decisions do not go so far as to require that the employee receive actual notice of the hearing." App at p A5.

Quite apart from *O'Neill's* gloss on *Cole* is the former's impact on the ruling by the Sixth Circuit in the case below. The conflict with respect to this case is self-evident for, in both appeals, (1) the same union constitution bestowing authority to represent, and receive notice on behalf of, the employee was involved, and (2) the employee's claim in each case was before a public law board. The only difference of distinction between the *O'Neill* and *LaFontaine* case is, quite paradoxically, that O'Neill apparently asserted that he had revoked his union's authority to act for him, thu entitling him to individual notice whereas here, LaFontaine who does not claim to have revoked his union's authority to act on his behalf, urges that he was nevertheless entitled to notice because he wished to be present at the time of the hearing and without Board notice could not be, his union having reneged on its promise to impart to him the notice he authorized it to receive on his behalf. We believe that the conflict between the circuits is manifest.

The conflict is intensified by the fact that this Court earlier declined to review the very decisions giving rise

to the onset of the conflict. Because this Court has yet to pass upon the substance of the Public Law Board mechanism, now twelve years in use, the other nine circuits are left without direction from this Court while, in the meantime, lower courts in the Sixth Circuit remain equally without direction on the overriding question of the extent to which, beyond the mere mailing of a notice, a Public Law Board is required to go to assure to railroad employees whatever vague rights the Sixth Circuit has impliedly created at the expense of union authority to handle its member's claims.

For these reasons, we ask this Court to grant our petition.

Respectfully submitted,

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Dated: October 3, 1978

OPINION

(United States Court of Appeals for the Seventh Circuit)
(No. 77-1339, August 11, 1978)
P. J. O'Neill v. Public Law Board No. 550

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before FAIRCHILD, Chief Judge, TONE, Circuit Judge and CAMPBELL, Senior District Judge.*

[*Statement of Case*]

CAMPBELL, S. D. J.: Plaintiff-Appellant O'Neill had been employed as a brakeman by the Penn Central Transportation Company (Penn Central) since 1941. He was also a member in good standing of the United Transportation Union (Union), which was the duly designated and authorized representative of the plaintiff under the Railway Labor Act (Act), 45 U. S. C. § 151 *et seq*. On May 9, 1972, O'Neill was suspended from employment pending a hearing into the charge that he had been in an unfit condition and in possession of alcoholic beverages during his tour of duty. On May 15, 1972, a customary "on the property" hearing was conducted, at which time O'Neill was present and accompanied by two representatives of the Union. On the following May 29, plaintiff was notified that he had been dismissed.

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

After two unsuccessful appeals of his dismissal through the Penn Central's review procedures, plaintiff, through his representative, sought arbitration. Plaintiff's case was placed on the docket of defendant Public Law Board No. 550 (Board), a special adjustment board created pursuant to the second paragraph of § 3 Second of the Act, 45 U. S. C. § 153 Second. On behalf of the plaintiff the Union presented a written submission and argued the case orally before the Board. The Penn Central similarly presented its position. In an award dated October 29, 1973, the Board denied plaintiff's claim.

Plaintiff then instructed [sic] this action in the district court seeking to have the decision of the Board[1] set aside for failure to comply with the provisions of the Act. On cross motion for summary judgment in favor of the defendant Board. We affirm.

[*Review of Public Board Award*]

In *United Transportation Union v. Indiana H. B. R. Co.*, [79 LC Paragraph 11,574] 540 F. 2d 861 (7th Cir. 1976), with which decision the present case was consolidated in a prior appeal, this Court held that the district courts have jurisdiction to review, at the behest of either aggrieved party, awards of public law boards created

[1] Neither the employee member nor the neutral member of Public Law Board No. 550 has appeared in this action. Appellee S. J. Wilson appeared in his capacity as carrier member of the Board and represents the interest of Penn Central in this appeal.

under § 3 Second of the Act. The scope of judicial review of the awards of such public law boards was established to be co-extensive with the scope of review of awards of the divisions of the National Railway Adjustment Board under 45 U. S. C. § 153 First (q), *i.e.*, the findings and order are conclusive on the parties except that the order may be set aside where there is failure of compliance with the requirements of the Act, where the order exceeds the Board's jurisdiction, or where there is fraud or corruption of a member making the order. In addition to these statutorily created parameters of review, it has been recognized that the decisions of the National Railway Adjustment Board are reviewable if they are violative of due process. *Union Pacific R. Co. v. Price*, 360 U. S. 601, 616 (1959); *Kotakis v. Elgin, J. & E. R. Co.*, [78 LC Paragraph 11,241] 520 F. 2d 570, 574 (7th Cir. 1975); *Edwards v. St. Louis-San Francisco Railroad Company*, [53 LC Paragraph 11, 232] 361 F. 2d 946, 953-954 (7th Cir. 1966); *Ellerd v. Southern Pacific Railroad Co.*, [31 LC Paragraph 70, 526] 241 F. 2d 541, 545 (7th Cir. 1957).

Plaintiff contends that the award of the Board is violative of his due process rights and failed to comply with the provisions of 45 U.S.C. § 153 First (j) because he was not personally given notice of any hearings before the Board, and he was not given the opportunity to appear personally before the Board.[2] Because the record demonstrates that plaintiff's representative, the United Transportation Union, received all necessary

[2] The complaint does not allege, nor does the appellant assert here that he did not know of the pendency of proceedings before the Board.

notices and represented plaintiff fully before the Board, as it was authorized to do, we find compliance with the requirements of both due process and 45 U. S. C. § 153 First (j).

Initially, we find no merit to the plaintiff's claim that the Union was not authorized to represent him before the Board because, after his discharge, he was no longer a member of the union and had not paid dues for the nearly two years prior to the Board's hearing in this case. It is well established that a union's duty to represent its members in disputes extends to those employees who have been dismissed. *E.g., Czosek v. O'Mara,* [62 LC Paragraph 10,680] 397 U. S. 25 (1970); *Vaca v. Sipes,* [55 LC Paragraph 11,731] 386 U. S. 171 (1967); *Conley v. Gibson,* [33 LC Paragraph 71,077] 355 U. S. 41 (1957).

Our first area of consideration is whether the provisions of 45 U. S. C. § 153 First (j) are applicable to proceedings before public law boards established under the second paragraph of 45 U. S. C. § 153 Second. 45 U. S. C. § 153 First (j) provides:

> Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any dispute submitted to them.

Nothing in 45 U. S. C. § 153 Second expressly incorporates the above-quoted provision pertaining to

divisions of the Adjustment Board into the provisions for public law boards. In this respect, we note that Section 153 Second suffers from the same deficiency of "inartful wording" expressed by the panel in *United Transportation Union v. Indiana H. B. R. Co., supra,* 540 F. 2d at 861. On the basis of the legislative history[3] of the 1966 Amendments to the Act, which evidences a Congressional intent that Section 153 Second incorporate the procedural requirements of Section 153 First (j), the Sixth Circuit has held that the provisions of Section 153 First (j) are applicable to proceedings before public law boards. *Cole v. Erie Lackawanna Ry. Co.,* [79 LC Paragraph 11,575] 541 F. 2d 528, 533 (1976), *cert denied,* — U. S. — 97 S. Ct. 2987 (1977). The majority of the *Cole* Court also held that even in the situation where an individual employee has authorized a union to represent him in proceedings before a public law board, actual notice of the proceedings must be given to the individual employee.[4] *Id.,* at 534. While we agree with the Sixth Circuit's reasoning and conclusion that the provisions of Section 153 First (j) are applicable to proceedings before public law boards, we hold in contrast to the Sixth Circuit that where an individual employee authorizes his union to represent him before such boards and to receive any notices on his behalf,

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[3] See 1966 U.S. Code Cong. and Admin. News, p. 2285 *et seq.*

[4] Although the Sixth Circuit stated that it agreed with a line of Seventh Circuit decisions, we think those decisions do not go so far as to require that the employee receive actual notice of the hearing.

Section 153 First (j) does not require that actual notice be given to the individual employee.[5]

[*Notice Requirement*]

In the instant case, notice was served upon, and plaintiff was represented by the United Transportation Union. Under the terms of the Union's constitution:

> Every member of the United Transportation Union grants complete authority to the United Transportation Union and any of its constituted representatives to act in said member's behalf for the purpose of disposing, in any manner, of any and all of said member's claims, complaints or grievances against their employer; and to submit such claims, complaints, or grievances for determination to any person, board, or other tribunal provided by law or otherwise as may be deemed to be necessary. The United Transportation Union shall have authority to receive notice of the hearings, or to waive hearing, and to appear for, represent, and act for its members before any person, board, or other tribunal in connection with consideration and determination of claims, complaints, or grievances, subject to the right of appeal in accordance with the provisions of this

[5] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the conflict between the holding of this case and the holding of the Sixth Circuit in *Cole v. Erie Lackawanna Ry. Co., supra.*

> Constitution, except where the member involved serves reasonable written notice on the United Transporation Union to the contrary.

Plaintiff did not serve written notice on the Union that he did not want the Union to represent him.

In *Elgin J. & E. R. Co. v. Burley*, [9 LC Paragraph 51,212] 325 U. S. 711 (*Burley I*) (1945), adhered to on rehearing, *Elgin J. & E. R. Co. v. Burley*, 327 U.S. 661 (*Burley II*) (1946), the Supreme Court was concerned with the question of the sufficiency of a collective bargaining representative's authority to represent individual employees as claimants before the National Railroad Adjustment Board. *Burley I* noted that the employee's rights under Section 153 First (j) are statutorily created rights which "he may exercise independently or authorize the union to exercise in his behalf." 325 U. S. at 740 n. 39. Although the Court in *Burley II* refrained from making a definitive statement of what might be sufficient evidence of a union's authority to represent an employee exclusively before the National Railroad Adjustment Board, the Court did indicate that "custom and usage" as well as "appropriate provisions in [a union's] by-laws, constitution, or other governing regulations" might serve as an adequate basis for such authority. 327 U. S. at 663-664 and n. 2.[6] We have also indicated that

[6] After the decision in *Burley II*, labor organizations apparently secured amendments to their constitutions providing for the consent of all members to a union's prosecution of grievances on behalf of its members. See *Employees v. Westinghouse Corp.*, [27 LC Paragraph 69,063] 348 U. S. 437, 458 (1955) (Opinion of Justice Frankfurter).

an employee may so authorize a union to represent him in proceedings before the National Railroad Adjustment Board that any notice received by the union on the employee's behalf is sufficient to fulfill the requirements of Section 153 First (j). See *Kotakis v. Elgin J. & E. R. Co., supra*, 520 F. 2d at 576; see also *Ellerd v. Southern Pacific RR Co., supra*, 241 F. 2d at 541, on remand, 191 F. Supp. 716 (N. D. Ill. 1961); cf. *Simberlund v. Long Island Rail Road Co.*, [62 LC Paragraph 10,645] 421 F. 2d 1219, 1225 (2nd Cir. 1970).

The record in this case shows that the Union initiated proceedings[7] before the Board following unsuccessful appeals within the Penn Central. The Union filed a submission and argued orally before the Board on plaintiff's behalf.[8] We find that by virtue of his

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[7] Under the terms of § 3 Second of the Act, an individual employee has no right to bring a matter before a special adjustment board. Only a rail carrier or "the representative of any craft or class of employees" are authorized by the statute to bring a matter before a special adjustment board. See *Brotherhood of Locomotive Engineers v. Denver & R. G. W. R. Co.*, [60 LC Paragraph 10,181] 411 F. 2d 1115, 1118 (10th Cir. 1969). Further, where an employee chooses not to be represented by his union, a rail carrier cannot submit a dispute involving the employee to a special adjustment board. *Chicago, R. I. & P. R. Co. v. National Mediation Board*, [64 LC Paragraph 11,351] 435 F. 2d 339 (7th Cir. 1970).

[8] Although § 3 Second indicates that the members of special adjustment boards are to "determine all matters not previously agreed on by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board," neither the statute nor the regulations promulgated thereunder (29 C. F. R. § 1207.1 *et seq.*) indicate the type of proceeding to be conducted by special adjustment boards. Counsel have advised us that in disciplinary matters such as this case, the board generally reviews the record made "on the property" of the carrier and the submissions of the parties. Generally, no new evidence is presented before public law boards.

membership in the Union, plaintiff authorized that organization to represent him in his disciplinary and review proceedings, and to receive any necessary notices on his behalf within the meaning of *Burley II*. As such, we find compliance with due process and sufficient satisfaction of the requirements of 45 U. S. C. § 153 First (j).

Accordingly, for the reasons stated herein, the judgment of the district court is affirmed.